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No. — 157

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

FRANCISCO BALLESTER PONS,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit which affirmed a judgment of the District Court of Puerto Rico denying naturalization to petitioner upon the ground that he is ineligible for citizenship.

Opinions Below

The opinion of the Court of Appeals, set forth in the Appendix, *infra*, is reported at 220 F. 2d 399. The opinion of the District Court (R. 77-85) is reported in 119 F. Supp. 629.

Jurisdiction

The judgment of the Court of Appeals was entered on March 22, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the Spanish Treaty of 1902 (33 Stat. 2105) granting nationals of Spain exemption from military service and "all obligatory official functions whatsoever" has been superseded by the Immigration and Nationality Act of 1952.

2. Whether petitioner became ineligible for American citizenship under the Immigration and Nationality Act of 1952 which provides that nothing in its naturalization provisions shall be applied "in contravention of the provisions of any treaty" (66 Stat. 272; 8 U. S. C. 1489) by reason of claiming draft exemption in 1944 under the Spanish Treaty of 1902.

3. Whether the Immigration and Nationality Act of 1952 which denies to aliens ineligible for citizenship the right to travel and reside in all parts of the United States and would confine such ineligible aliens to the territorial limits of Puerto Rico, Alaska, or Hawaii, is inconsistent with and superseded the Spanish Treaty of 1902 which grants nationals of Spain the right to travel and reside in all parts of the United States on terms equal to that of nationals of the most favored nation.

4. Whether Congress intended to respect and abide by the provisions of existing treaties when it enacted the Immigration and Nationality Act of 1952.

5. Whether petitioner is eligible to American citizenship under the Immigration and Nationality Act of 1952 or whether he is permanently barred from citizenship notwithstanding the Spanish Treaty of 1902.

Statutes and Treaties

The Treaty of Friendship and General Relations between the United States and Spain, signed at Madrid July 3,

1902 and proclaimed April 20, 1903 (33 Stat. 2105; 2 Malloy 1701) provides in part:

"ARTICLE II

There shall be a full, entire and reciprocal liberty of Commerce and navigation between the citizens and subjects of the two High Contracting Parties, who shall have reciprocally the right, on conforming to the laws of the country, to enter, travel and reside in all parts of their respective territories, saving always the right of expulsion which each Government reserves to itself, and they shall enjoy in this respect, for the protection of their persons and their property, the same treatment and the same rights as the citizens or subjects of the country or the citizens or subjects of the most favored Nation.

They can freely exercise their industry or their business, as well wholesale as retail, without being subjected as to their persons or their property, to any taxes, general or local, imposts or conditions whatsoever, other or more onerous than those which are imposed or may be imposed upon the citizens or subjects of the country or the citizens or subjects of the most favored Nation.

It is, however, understood that these provisions are not intended to annul or prevent, or constitute any exception from the laws, ordinances and special regulations respecting taxation, commerce, health, police, and public security, in force or hereafter made in the respective countries and applying to foreigners in general.

• • • • • • •

ARTICLE V

The citizens or subjects of each of the High Contracting Parties shall be exempt in the territories of the other from all compulsory military service, by land or sea, and from all pecuniary contributions in lieu of such, as well as from all obligatory official functions whatsoever."

Section 303(a) of Title 50, Appendix, United States Code, pertaining to exemption of neutral aliens from military service, reads in part as follows:

"Persons liable for training and service; number; term status after completion of term; pay; allowances; and benefits; place of employment

(a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: . . ."

Section 316(a) of Title 50, Appendix, United States Code, relating to the suspension of laws conflicting with the

Selective Training and Service Act of 1940, and the expiration of the Act reads as follows:

> "Suspension of conflicting laws; expiration of Act; appropriations.
>
> (a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force * * *"

Section 101(a)(19) of the Immigration and Nationality Act (66 Stat. 169; 8 U.S.C. 1101-a-19) provides:

> "The term 'ineligible to citizenship,' when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently barred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76) or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts."

Section 212(a)(22) of the Immigration and Nationality Act, effective December 24, 1952, (66 Stat. 184; 8 U.S.C. 1182(a)(22)) provides that the following are ineligible for visas and inadmissible to the United States:

> "Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants . . ."[1]

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[1] As interpreted by the Immigration Service, entry includes a coming from Puerto Rico to continental United States, 8 U. S. C. 1182 (d)(7). Compare *Alcantra* v. *Boyd*, (C.A. 9, May 10, 1955) 23 L. W. 2609. Nonimmigrants include various classes of visitors 8 U. S. C. 1101 (a)(15).

Section 315 of the Immigration and Nationality Act effective December 24, 1952 (66 Stat. 242; 8 U.S.C. 1426) provides in part:

> "(a) Notwithstanding the provisions of section 405 (b) any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.
>
> (b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

Section 357 of the Immigration and Nationality Act, effective December 24, 1952 (66 Stat. 272; 8 U.S.C. 1489) provides in part:

> "Nothing in this title shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party and which has been ratified by the Senate upon the effective date of this title. . . ."

Section 405(b) of the Immigration and Nationality Act, effective December 24, 1952 (66 Stat. 280; 8 U.S.C. 1101 footnote) provides:

> "Except as otherwise specifically provided in title III any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with

the requirements of law in effect when such petition was filed."

Section 13(c) of the Immigration Act of 1924 (43 Stat. 161-162; 8 U.S.C. 213 c) provided in part:

> "No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant under the provisions of subdivision (b) [a returning resident] (d) [a minister or professor] or (e) [a student] of section 204. . . ."

Section 28(c) of the Immigration Act of 1924, as amended October 29, 1945 (43 Stat. 168; 59 Stat. 551; 8 U.S.C. 224 c) provided:

> "The term 'ineligible to citizenship' when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under sections 703 and 706 of this title, or section 303(a) of Appendix to Title 50, or under any law amendatory of, supplementary to, or in substitution for any such sections. . . ."

Statement

The petitioner is a native of Spain and is married to an American citizen. He entered the United States for permanent residence at San Juan Puerto Rico on December 26, 1934, has a continuous residence in the United States of seventeen years and is a respected member of the community in Puerto Rico. (R. 77). After receiving an order to report for a pre-induction physical examination in 1944, the appellant advised his draft board on November 1, 1944, that he desired to invoke the Spanish Treaty of 1902 granting him exemption from military service (R. 4, 78).

The Spanish Treaty granted nationals of Spain exemp-

tion "from all compulsory military service by land or sea, * * * as well as from all obligatory official functions whatsoever" (Art. V, *supra*, p. 4) and accorded them the right to reside in all parts of the United States on the same conditions as the citizens of the most favored nations. (Art. II, *supra*, p. 3)

Beginning with the enactment of the Selective Training and Service Act of 1940 (50 App. U.S.C. 303-a), the Spanish Embassy on October 14, 1940 contended that under the Spanish Treaty, its nationals were automatically exempt from military service. These protests have continued through to its most recent note to our State Department on May 18, 1955 which states in part:

> "When the Spanish Embassy secured the relief from military service in the United States of the Spanish nationals, whose cases are now pending, this was done on the basis of a treaty and of the neutral status of Spain at that time.* * * The Spanish subjects who are now penalized by immigration restrictions as a result of their former exemption from military service in the United States, obtained this relief through the action of their Embassy in Washington, which instructed them to claim it."

On November 2, 1944, petitioner subscribed to DSS Form 301, an application by a neutral alien for relief from military service (R. 27).

Petitioner submitted evidence (R. 32) that in 1944, he was a reservist in the Spanish Army and that under Spanish law his citizenship would be lost by foreign military service without permission from the King[2] (thus render-

[2] Article 20 of the Spanish Civil Laws of 1889 provides that Spanish nationality is lost "by entering the Armed Services of a foreign power without the permission of the King (Constitution I, 2; Civil Code 23)." *Flournoy and Hudson, Nationality Laws*, page 538.

ing him stateless). He testified that his purpose in claiming exemption was due to the fact that he was "subject to the Army regulations and subject to being called at any time by the Spanish Army . . . and was not through with [his] oath with the Spanish Army." He asserted that he "could not swear to another nation" when he "was on duty" to his own (R. 19, 20, 28); that he was forbidden to enlist in our Army (R. 57-58) and that he did not understand that he would be barred from becoming an American since "the treaty between Spain and the United States was still in force". (R. 28). However, he was told that he had to sign DSS Form 301 in order to secure exemption (R. 57). If he had not been in the reserve forces of the Spanish Army, he would not have invoked the treaty. (R. 58). Petitioner was granted exemption by his draft board in 1944 and on December 16, 1952, he filed a petition seeking naturalization as an American citizen (R. 2).

Upon these facts, the District Court held (R. 77) that petitioner was permanently barred from American citizenship pursuant to 50 App. U.S.C. 303 (a) and 8 U.S.C. 1426.

The Court of Appeals affirmed. It acknowledged that the Selective Training and Service Act ceased to apply after 1947 but asserted that thereafter and until 1952, the Immigration Act of 1924 was applicable. The Court of Appeals found that petitioner was ineligible for citizenship under the 1952 Act as well as under pre-existing law upon the ground that no inconsistency existed between the Spanish Treaty of 1902 and these laws and if such inconsistency was presented, that these later laws prevailed over the treaty. (Appendix, *infra*, pp. 19, 20).

Reasons for Granting the Writ

1. The United States has executed reciprocal military exemption treaties with ten countries. In addition to that

with Spain, we have such treaties with Argentina (10 Stat. 1005, 1009), China (63 Stat. Pt. II), Costa Rica (10 Stat. 916, 921), Ireland (Dept. of State Treaties and Other Int'l Act Series, 2155), Italy (63 Stat. Pt. II), Paraguay (12 Stat. 1091, 1096) Switzerland (11 Stat. 587, 595) and Yugoslavia (22 Stat. 963, 964). During World War II many of the nationals of these countries, including approximately 30 Spanish nationals residing in Puerto Rico and about 40 in continental United States, claimed draft exemption pursuant to these treaties. The Spanish Treaty of 1902, in the broadest terms of any of these treaties, asserts that the nationals covered thereby shall be exempt from all military service and from "all obligatory official functions whatsoever". Moreover, it grants citizens of Spain the right to "travel and reside in all parts" of the United States upon terms equal to that of citizens of the most favored nations.

Congressional awareness of the provisions of these treaties is demonstrated in section 357 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1489) which provides that nothing in the nationality title (title III) of the Act "shall be applied in contravention of the provisions of any treaty".

The Court below, relying upon *Moser* v. *United States*, 341 U.S. 41 (1951) found the Spanish Treaty consistent with our immigration and nationality laws. Four basic distinctions are presented by persons invoking the Spanish Treaty from those who relied upon the Swiss Treaty.

a. The Spanish Treaty unlike the Swiss Treaty provides that citizens of Spain are to be exempt from "all obligatory official functions whatsoever". We submit that under this provision, Spanish nationals were not obliged to register, serve or claim draft exemption under any of the Selective Service Acts, and that they were entitled to draft exemp-

tion without the restriction of ineligibility of citizenship. If a Spanish national was exempt from military service under the treaty, "his act in applying for relief from a non-existent duty could not create the bar against naturalization" *McGrath* v. *Kristensen*, 340 U.S. 162, 172, (1950).

b. This Court found that the Swiss Treaty was consistent with our 1940 Selective Training and Service laws and with the imposition of citizenship ineligibility in view of the express exclusion of political rights from the Swiss Treaty. 341 U.S. at 45, 46. The Spanish Treaty does not specifically exclude political rights.

c. Unlike the situation presented in the *Moser* case, Congress provided since 1952 that in determining eligibility for citizenship, treaty provisions were to be respected (8 U.S.C. 1489).

d. Finally, it should be observed that the Government, in the *Moser* case, specifically recognized that the signatory powers did not contemplate "conditions on exemption from military service which would render that grant nugatory". "And so, it may be assumed • • • that denial of any • • • specifically granted rights as a consequence of freedom from military service would be in contravention of the treaty". (Gov't Brief, *Moser* v. *United States*, pp. 31-33). Here, if petitioner is ineligible for citizenship, he is denied rights specifically granted by the Spanish Treaty. The treaty grants him the right to travel and reside in all parts of the United States. If he is ineligible for citizenship, contrary to the treaty provisions, petitioner may not in view of the present administrative interpretation of the Immigration and Nationality Act (8 U.S.C. 1182-d-7 and 8 U.S.C. 1182-a-22) leave Puerto Rico and come to continental United States. Here is a clear inconsistency with the treaty as acknowledged by the Government in its *Moser* Brief. This restriction affects some 30 Spanish nationals in Puerto Rico. It likewise affects many other treaty na-

tionals who have been denied the right to travel lawfully between continental United States and our territories.

Treaty rights are to be liberally construed. *Chew Heong* v. *United States,* 112 U.S. 536 (1884). Of course, Congress may by a later enactment abrogate a treaty provided that such purpose has been clearly expressed. *Cook* v. *United States,* 288 U.S. 102 (1933); *Cheung Sum Shee* v. *Nagle,* 268 U.S. 336 (1925). The importance of our treaty obligations, as it affects international rights not only of foreign nationals but also the privileges and liabilities of our own citizens residing abroad can not be minimized. If the United States has abrogated treaty rights by the enactment of the Immigration and Nationality Act of 1952, then our nationals may no longer be free from foreign military service in many foreign lands.

The violation of treaty rights by the present administrative interpretation of the Immigration and Nationality Act of 1952 has been the subject of protests by the Spanish Government. Objection has been taken specifically to the restrictions imposed upon Spanish nationals in Puerto Rico who are denied freedom of travel from that island. In response to these protests, our State Department replied on August 26, 1953:

> "The Attorney General has ruled that until such time as the issue is resolved by the Courts, the Department of Justice will take the position, in the administration of Section 315 of the Act, that nationals of treaty countries who were discharged from military service on treaty grounds prior to the enactment of that Act are barred from United States citizenship."

The instant case presents for the first time the important question as to whether or not the Spanish Treaty and our Immigration and Nationality Act of 1952 are consistent. More important is the interrelation of treaty rights with

the Immigration and Nationality Act of 1952 and the issue as to whether Congress has by statutory enactment curtailed those treaty rights. Resolution of these important questions which affect our own citizens as well as numerous individuals residing in continental United States and in our territories can only be effected by Supreme Court review.

2. The Court of Appeals recognized that the Immigration and Nationality Act of 1952 contained two conflicting provisions. Section 357 (8 U. S. C. 1489) provides that nothing in the nationality sections of the law shall be applied in contravention of any treaty. However, section 101 (a) (19) [8 U. S. C. 1101 (a) (19)] defines the term "*ineligible to citizenship*" notwithstanding treaty provisions. Nowhere in section 315 of the 1952 Act (8 U.S.C. 1426), the naturalization section under which the Court below denied petitioner citizenship, is the expression "ineligible to citizenship" utilized. It is only utilized in the immigration section (8 U. S. C. 1182-a-22) excluding "aliens who are ineligible to citizenship". Nevertheless the Court of Appeals transposed this imimgration definition into the naturalization provisions of the law and thereby nullified section 357. To determine the proper scope of these various sections in our immigration and nationality laws it is appropriate that this Court grant certiorari.

3. It is clear that petitioner's right to naturalization is to be controlled by the Immigration and Nationality Act of 1952. Although he filed his petition for naturalization on December 16, 1952, prior to the effective date of the 1952 Act, section 405 (b) of the new act specifically requires the application of its provisions to those who are alleged to be ineligible to become a citizen of the United States. This construction conforms to the rationale of *Shomberg* v. *United States,* 348 U. S. 540 (1955). The Court below, however, erroneously applied the Immigration Act of 1924 (8 U. S. C. 224-c) which was inapplicable not only because it

related solely to immigration and not to naturalization but also because it had been repealed by the 1952 Act. (66 Stat. 279). Certiorari is appropriate herein to authoritatively settle the proper relationship of section 405(b) of the savings clause of the Immigration and Nationality Act of 1952 (66 Stat. 280) to section 315 (66 Stat. 242, 8 U. S. C. 1426).

Conclusion

In view of the importance of the questions presented as it affects treaty rights and the proper construction of the Immigration and Nationality Act, it is respectfully submitted that a writ of certiorari should issue to review the judgment below.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4865

FRANCISCO BALLESTER PONS, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

* * * * * * *

Before MAGRUDER, *Chief Judge,* and MARIS and WOODBURY, *Circuit Judges*

* * * * * * *

OPINION OF THE COURT—March 22, 1955

MAGRUDER, *Chief Judge:*

We are quite satisfied that the district court correctly denied appellant's application for naturalization filed December 16, 1952, which is the subject matter of this appeal. That court ruled that appellant was, under the applicable Acts of Congress, forever barred from obtaining American citizenship by reason of having, as a resident alien and a citizen or subject of a neutral country, applied for and obtained exemption from military service under the Selective Training and Service Act of 1940, as amended. 54 Stat. 885, 55 Stat. 844.

Francisco Ballester Pons was born in Spain in 1908. He became from birth a Spanish subject and has remained such. On December 26, 1934, he entered the United States for permanent residence at San Juan, Puerto Rico. After visits to Spain in 1935 and 1936 he returned to Puerto Rico, where he has been continuously residing ever since. As stated by the district court, all of appellant's interests, business

and social, "are in Puerto Rico, where he has entered the community whole-heartedly and is now a respectable and respected member thereof."

On January 17, 1929, Ballester obtained from the Spanish Consul at Santo Domingo an identification card showing that he was a member of the Spanish Army Reserve. Under Spanish law, male Spanish nationals living in certain countries of Spanish origin could, by registration and money payment, plus the making of an annual report, be exempt from Spanish military service unless the outbreak of war required total Spanish mobilization. Appellant complied with this procedure for the required period of eighteen years, after which, in 1947, he was absolutely discharged from any further obligation to give military service to Spain. The bearing of the facts recited in this paragraph will become apparent subsequently.

A Treaty of Friendship and General Relations between the United States and Spain, signed at Madrid July 3, 1902, and proclaimed April 20, 1903 (33 Stat. 2105) provides in part as follows:

"Article II

There shall be a full, entire and reciprocal liberty of commerce and navigation between the citizens and subjects of the two High Contracting Parties, who shall have reciprocally the right, on conforming to the laws of the country, to enter, travel and reside in all parts of their respective territories, saving always the right of expulsion which each Government reserves to itself, and they shall enjoy in this respect, for the protection of their persons and their property, the same treatment and the same rights as the citizens or subjects of the country or the citizens or subjects of the most favored Nation.

They can freely exercise their industry or their busi-

ness, as well wholesale as retail, without being subjected as to their persons or their property, to any taxes, general or local, imposts or conditions whatsoever, other or more onerous than those which are imposed or may be imposed upon the citizens or subjects of the country or the citizens or subjects of the most favored Nation.

It is, however, understood that these provisions are not intended to annul or prevent, or constitute any exception from the laws, ordinances and special regulations respecting taxation, commerce, health, police, and public security, in force or hereafter made in the respective countries and applying to foreigners in general.

Article V

The citizens or subjects of each of the High Contracting Parties shall be exempt in the territories of the other from all compulsory military service, by land or sea, and from all pecuniary contributions in lieu of such, as well as from all obligatory official functions whatsoever. . . ."

The treaty exemption in Art. V is from "compulsory military service," which leaves open and unprescribed the procedure by which a person called to service may manifest his unwillingness to serve—if such is his state of mind—and thus obtain his release from any military obligation. As applied to a given individual, Art. V is not "automatic" in the sense that the alien, if he is unwilling to render military service, may simply ignore a summons to service, or ignore the procedure, set up or authorized by legislative enactment, whereby the alien may claim his exemption from compulsory military service by making a declaration to the proper authorities of his unwillingness to serve.

Therefore, entirely consistent with the exemption contained in Art. V of the treaty, § 3(a) of the Selective Training and Service Act of 1940 (55 Stat. 845) provided as follows:

> "Sec. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: *Provided further,* That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces."

This statutory provision, it may be noted, enabled any neutral alien who was unwilling to render military service to the United States to be relieved from this liability, whether or not the alien was also covered by a treaty exemption as in Art. V of the treaty with Spain. Of course, this was a matter within the discretion of Congress; and the fact that the statutory provision for exemption was

broader than that required by treaty in no way derogates from the conclusion that the Spanish alien's right under Art. V of the treaty was fully protected under § 3(a), as amended, of the Selective Training and Service Act. The clause in the first proviso of § 3(a), that any person who made application to be relieved from such military service, in accordance with regulations prescribed by the President, "shall thereafter be debarred from becoming a citizen of the United States", is not in conflict with Art. V of the treaty, for nothing in Art. V, and indeed nothing in the whole treaty, purports to impose any limitation upon the power of the respective countries to formulate the conditions of eligibility for naturalization. As the Supreme Court stated in reference to a similar provision of the treaty with Switzerland: "That the statute unquestionably imposed a condition on exemption not found in the Treaty does not mean they are inconsistent. Not doubting that a treaty may be modified by a subsequent act of Congress, it is not necesary to invoke such authority here, for we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purposes and subject matter of the Treaty. The Treaty makes no provsion respecting citizenship." *Moser* v. *United States,* 341 U. S. 41, 45 (1951).

It is suggested by appellant that the bar to naturalization contained in the proviso of § 3(a) was inconsistent with certain other provisions of the treaty with Spain. We do not think that this was so. But we do not stop to labor the point, for even if it were so, it is prefectly well-settled that provisions of a subsequent Act of Congress may, for purposes of domestic law, supersede inconsistent provisions of a prior treaty with a foreign country. See *Head Money Cases,* 112 U. S. 580, 597-99 (1884); *Pigeon River Co.*

v. *Charles W. Cox, Ltd.*, 291 U. S. 138, 160 (1934); *Clark* v. *Allen*, 331 U. S. 503, 508-09 (1947).

Appellant duly registered under the Selective Training and Service Act of 1940. On October 21, 1944, he was directed by his draft board to report for pre-induction physical examination.

The administrative regulation which had been issued under authority of § 3(a) of the Act required a neutral alien, seeking to be relieved from military service, to execute DSS Form 301 (Application by Alien for Relief from Military Service), which application form read in part as follows: "I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in acordance with the Act of Congress, approved Deember 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I have not filed a declaration of intention to become a citizen of the United States."

It appears that in 1942 appellant's brother, Jaime Ballester Pons, upon receiving a notice to report for induction, had sought to claim automatic exemption from service by virtue of Art. V of the treaty with Spain. The draft board, however, insisted that Jaime would have to execute DSS Form 301 if he wished to be relieved from military duty. Thereupon Jaime communicated with the Spanish Ambassador to the United States seeking support for his claim that it was unnecessary for him to execute DSS Form 301 in view of Art. V of the treaty. However, on January 5, 1943, the Spanish Ambassador advised Jaime to execute DSS Form 301, which he did.

When appellant received his notice to report for pre-induction examination, he at first sought unsuccessfully, as

had his brother, to invoke the treaty without executing DSS Form 301. However, he was informed by the draft board that he would either have to make application for relief under DSS Form 301 or else prepare for induction. On November 2, 1944, appellant executed DSS Form 301 and was placed by his draft board in category IV-C (Neutral aliens requesting relief from training and service); a little over one year later he was reclassified IV-A (Over the age of liability for military service). The question is whether the alien in thus applying to be relieved of liability to military service rendered himself ineligible for subsequent naturalization.

Appellant's main reliance is upon *Moser* v. *United States*, 341 U.S. 41 (1951). In that case the resident alien was exempted from compulsory military service by a provision of the treaty with Switzerland. When the draft board classified him I-A (Available for military service), the alien sought the aid of the Swiss Legation in securing his deferment in accordance with the treaty. The Swiss Legation protested to the Department of State that the declaration required of applicants in filing DSS Form 301 was inconsistent with the treaty right of Swiss citizens. The State Department, assuring the Swiss Legation that the United States had no intention of abrogating treaty rights, negotiated an agreement with Selective Service Headquarters upon a Revised Form 301 which omitted the waiver declaration, though a footnote of the Revised Form did quote the pertinent provisions of § 3(a). The Swiss Legation forwarded to the alien a copy of this Revised DSS Form 301 which it requested him to execute. The letter of the Swiss Legation assured the alien that "through filing of DSS Form 301, revised, you will not waive your right to apply for American citizenship papers." Under these circumstances the alien signed the Revised Form 301, and his draft

board reclassified him IV-C. A finding of the district court, accepted by the court of appeals and by the Supreme Court, was to the effect "that petitioner signed the application for exemption believing that he was not thereby precluded from citizenship, and that had he known claiming exemption would debar him from citizenship, he would not have claimed it, but would have elected to serve in the armed forces."

The Supreme Court held as a matter of law that § 3(a) of the Act "imposed a valid condition on the claim of a neutral alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship." (341 U.S. at 46) It could hardly be suggested that this alternative was an unconscionable one, applicable as it was not to aliens who were only temporary sojourners in the United States, but only to resident aliens "who sought the advantages of our life and the protection of our flag." *McGrath* v. *Kristensen*, 340 U.S. 162, 175-76 (1950). But the Supreme Court read into § 3(a) the implication that the bar to naturalization would not operate until the alien had made an intelligent choice between the alternatives presented, well knowing the legal effect of what he did. For that reason, in order not to "entrap" the alien, the Court held that he had not waived his right to apply for future naturalization by having executed the Revised DSS Form 301. "Petitioner did not knowingly and intentionally waive his rights to citizenship. In fact, because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing else than an intelligent waiver is required by elementary fairness." (341 U.S. at 47)

The case at bar presents a significantly different picture

from that in *Moser* v. *United States*. No misrepresentations were made to Francisco Ballester Pons; he was never deceived as to the legal effect of applying for relief from military duty by executing DSS Form 301. In asking to be so relieved, his only purpose, as his testimony showed, was to avoid possible penalties under the Spanish law for entering the military service of the United States when he was still under a conditional commitment to military service in Spain in his capacity as a member of the Spanish Army Reserve. The district court found, upon ample evidence, that when appellant came to execute DSS Form 301, he was "perfectly aware of the fact that by signing the form he was forever debarring himself from American citizenship." The fact that this was the only way he could avoid the obligation to report for induction did not constitute such "duress" as would negative "an intelligent election" on his part; it was of the essence of the alternatives lawfully presented to him that he "had a choice of exemption and no citizenship, or no exemption and citizenship." We shall say no more in elaboration upon the inapplicability of *Moser* v. *United States* to the case at bar, since the point has been so fully and convincingly discussed in the opinion of the district court. 119 F. Supp. 629.

When Congress by amendment in 1941 of § 3(a) of the Selective Training and Service Act provided that "any person who makes such application shall thereafter be barred from becoming a citizen of the United States", it omitted to make a corresponding amendment of the substantive provisions of the Nationality Act of 1940 (54 Stat. 1137) prescribing the conditions of eligibility for naturalization. And § 3(a), along with the other sections of the Selective Training and Service Act of 1940, as amended, became inoperative and ceased to apply on the indicated date in 1947, as provided in the Act of June 29, 1946 (60

Stat. 342). But meanwhile, on October 29, 1945 (59 Stat. 551), Congress had amended § 28(c) of the Immigration Act of 1924 (43 Stat. 168) so as to include within the term "ineligible to citizenship" persons debarred from citizenship under § 3(a) of the Selective Training and Service Act of 1940, as amended; and it has uniformly been held that in so doing Congress intended to continue in effect the disqualification to naturalization in § 3(a) of the Selective Training and Service Act. See *Benzian* v. *Godwin*, 168 F. 2d 952, 956-7 (C.A. 2d, 1948), cert. denied 335 U.S. 886 (1948).

If the matter were otherwise doubtful, it was set at rest by provisions of the Immigration and Nationality Act of 1952 (66 Stat. 163), which became effective December 24, 1952 (66 Stat. 281). Appellant had filed his petition for naturalization on the preceding December 16, 1952, on which date he was ineligible to citizenship by virtue of the amended § 28(c) of the Immigration Act of 1924, as above stated. The Immigration and Nationality Act of 1952 repealed the Immigration Act of 1924 (66 Stat. 279). But § 405(b) of the Immigration and Nationality Act (66 Stat. 280) provides that any petition for naturalization pending on the effective date of the Act shall be determined in accordance with the requirements of law in effect when such petition was filed, except as otherwise specifically provided in Title III. Turning then to Title III of the Act, § 315 thereunder, captioned "Alien Relieved from Training and Service in the Armed Forces of the United States because of Alienage Barred from Citizenship", provides as follows (66 Stat. 242):

> "Sec. 315. (a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training

Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

This section would seem clearly enough to constitute an absolute bar to citizenship, even for a person who had petitioned for naturalization prior to the effective date of the Act, and regardless of whether exemption from military service was sought and obtained under the regulations prescribed by the President pursuant to § 3(a) of the Selective Training and Service Act, as amended, or by virtue of an exemption contained in a treaty. In this respect the bar of § 315(a) of the Immigration and Nationality Act is wider than that of § 3(a) of the Selective Training and Service Act, and would have precluded appellant even if he had not executed DSS Form 301 in claiming the exemption. It is true that § 357 of the Immigration and Nationality Act provides (66 Stat. 272) that nothing in Title III "shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party and which has been ratified by the Senate upon the effective date of this Title". But as pointed out earlier in this opinion, excluding from eligibility to citizenship resident aliens who have chosen not to render military service to the United States is not inconsistent with the treaty provisions. Furthermore, in this connection the government calls our attention to § 101(a)(19) of the Immigration and Nationality Act (66 Stat. 169), which provides as follows:

"(19) The term 'ineligible to citizenship,' when used in reference to any individual, means, *notwithstanding the provisions of any treaty relating to military service,* an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts." [Italics added.]

The judgment of the District Court is affirmed.

(2264-0)

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 157

FRANCISCO BALLESTER PONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 15–26, R. 87–98) is reported at 220 F. 2d 399. The opinion of the district court (R. 77–85) is reported at 119 F. Supp. 629.

JURISDICTION

The judgment of the Court of Appeals was rendered on March 22, 1955. The petition for a writ of certiorari was filed on June 16, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner, a Spanish national who sought and was granted exemption from military service as a neutral alien, is debarred from citizenship under section 315 (a) of the Immigration and Nationality Act of 1952.

STATUTES AND TREATY PROVISION INVOLVED

Section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended (50 U. S. C. App. [1946 ed.] 303 (a)), which was repealed in 1947 (60 Stat. 342), provided in pertinent part:

> Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, * * * shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: * * *.

The Immigration and Nationality Act of 1952, 66 Stat. 163 (8 U. S. C. 1101, *et seq.*), provides in pertinent part:

> Section 101 (a) (19) (8 U. S. C. 1101):
>
> The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3 (a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4 (a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.
>
> * * * * *
>
> Section 315 (8 U. S. C. 1426):
>
> (a) Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

Section 357 (8 U. S. C. 1489):

Nothing in this title shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party and which has been ratified by the Senate upon the effective date of this title: * * *

Section 405 (b) of the Act [66 Stat. 280]:

* * * * *

Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

Article V of the Treaty between the United States and Spain of Friendship and General Relations signed July 3, 1902, and proclaimed April 20, 1903 (33 Stat. 2105), provides in pertinent part:

The citizens or subjects of each of the High Contracting Parties shall be exempt in the territories of the other from all compulsory military service, by land or sea, and from all pecuniary contributions in

lieu of such, as well as from all obligatory official functions whatsoever.

STATEMENT

Petitioner, a 47-year-old merchant, presently residing in Puerto Rico, was admitted to Puerto Rico for permanent residence in December 1934 (R. 2, 3). On December 16, 1952, he filed a petition for naturalization in the United States District Court for the District of Puerto Rico alleging that in February 1938 he had married a native-born American citizen and claiming the exemptions granted to spouses of United States citizens under the general provisions of the Nationality Act of 1940 (8 U. S. C. 710 (b)) (R. 2, 8).

The Immigration and Naturalization Service objected to the granting of the petition on the ground that petitioner was ineligible for citizenship, having incurred such disability under Section 315 of the Immigration and Nationality Act of 1952 (*supra,* pp. 3–4) and under Section 3 (a) of the Selective Training and Service Act of 1940, as amended (*supra,* p. 2) by applying for and being granted exemption from military service in the armed forces of the United States as a neutral alien (R. 9, see also R. 61).

It was shown at the hearings that petitioner and his brother, Jaime, also an alien resident of Puerto Rico, were members of the Spanish Army

Reserve (R. 63–64).[1] In 1942, when petitioner's brother was called for service under the Selective Training and Service Act of 1940, the Spanish consul advised them that, in view of the 1902 Treaty between the United States and Spain, as members of the Spanish reserve they could not be compelled to serve in the United States Army and did not have to execute D. S. S. Form 301, in order to claim exemption from such service (R. 64). Thereupon the brothers went to the draft board and explained their position on the draft question. The Selective Service board granted petitioner's brother a deferment until he could receive advice from the Spanish Ambassador in Washington (R. 64). The Spanish Ambassador wired that his efforts to secure automatic exemption for Jaime were unsuccessful and that he should fill out the necessary forms (R. 42–47; R. 64–65). The brother thereupon signed D. S. S. Form 301 and was released from military service (R. 66).

When petitioner was called for military service in 1944, he sought automatic exemption on the basis of the 1902 treaty (R. 4–5). The draft board advised him either to sign D. S. S. Form 301 or prepare to be inducted, and refused any

[1] This reserve consisted of all male Spanish nationals living in countries of Spanish origin who by registration, money payments and annual reporting were exempt from Spanish military service, except in the event of total Spanish mobilization (Ex. III, R. 15–22, 20, 35–41).

deferment to permit petitioner to consult the Spanish Ambassador (R. 68–69, 70–71). Thereupon on November 2, 1944, petitioner executed and filed with the board the standard D. S. S. Form 301 (R. 71), which contained the following statement (Ex. No. 1, R. 30–31, 30):

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under The Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I have not filed a declaration of intention to become a citizen of the United States.

In 1945, while being examined by the Immigration and Naturalization Service, petitioner testified that he understood when signing D. S. S. Form 301 that he would thereafter be barred forever from becoming a citizen of the United States, that he fully understood the implications of his action and that his action was entirely voluntary (R. 10–13). In another such examination on March 29, 1951, in answer to whether he ever had or now has the desire to become a citizen of the United States, petitioner said "Before now, I have not had the desire, but you ask me from now on, I would say yes" (R. 21). In

April 1953, petitioner filed a statement with the Immigration and Naturalization Service claiming that when the question was asked, he mistook the examiner's use of the word "desire" for "decide", and he answered accordingly (R. 14).

At the preliminary hearing on the petition for naturalization, the following testimony was elicited from petitioner (R. 27–28):

> Q. Did you realize the full consequence of your act in signing this form?
>
> A. I did but in order to be on record I accompanied a letter invoking the treaty between Spain and the United States.
>
> * * * * *
>
> Q. Did you understand that the bar to becoming an American citizen would not be for a specified period of time but would be forever?
>
> A. I was not sure because I was thinking that the treaty between Spain and United States was still in force and I had no alternative. It was either sign or go to the training camp.
>
> Q. What was your purpose in making this application for relief from military service?
>
> A. The purpose was that I was under Spanish regulations and I thought that I could not swear to another nation when I was on duty to my own.

At the hearing on the petition, petitioner testified that he asked for relief from military service (R. 70):

> Because neither morally nor legally could I break my oath to the Spanish Army without suffering penalties and consequences of this act. It would also embarrass my parents who were living in Spain. And it would have brought dishonor and other consequences which I thought I should avoid.

In answer to the court's question as to whether at the time he executed D. S. S. Form 301 he intended to become an American citizen, petitioner said that at that time he was a Spanish citizen subject to the law of his country and he could not serve two countries (R. 72–73).

The trial court denied the petition for naturalization (R. 85). It held that the instant case was not governed by this Court's decision in *Moser* v. *United States,* 341 U. S. 41, and that both Section 3 (a) of the Selective Training and Service Act of 1941 as amended, and Section 315 of the Nationality Act of 1952 barred petitioner from citizenship (R. 78–84).

On appeal, the Court of Appeals affirmed the judgment denying the petition for naturalization (R. 98).

ARGUMENT

The sole issue before this Court is whether petitioner is debarred from citizenship under Section 315 (a) of the Immigration and Na-

tionality Act of 1952.[2] While the Court of Appeals found petitioner ineligible both under the 1952 Act and prior statutes (see Pet. 23–25), we agree with petitioner (Pet. 13–14) that it is unnecessary to consider more than the 1952 Act in view of the language of Section 315 (a):

> Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

See *Shomberg* v. *United States*, 348 U. S. 540.

Since petitioner sought and was granted exemption as a neutral alien, he is clearly debarred from citizenship under the specific language of Section 315.

Petitioner argues (Pet. 9–14) that Section 315 (a) does not apply to his case because Section 357, *supra*, p. 4, provides that "nothing in this

[2] Petitioner seeks to inject into the case questions concerning his right, as an alien, to travel to the United States from Puerto Rico (Pet. 3, 11–12). That issue is manifestly not here on petitioner's application for admission to citizenship. Whether petitioner may properly be excluded from the United States as a Spanish national can be determined if he tries to enter continental United States. *International Longshoremen's Union* v. *Boyd*, 347 U. S. 222.

title shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party", and that the Court of Appeals erred in ruling that this general provision must be interpreted in the light of Section 101 (a) (19) which specifically provides that the term "ineligible to citizenship * * * means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3 (a) of the Selective Training and Service Act of 1940, as amended * * *." The question of whether Section 315 overrules provisions of prior treaties is not even reached since, as the Court of Appeals also ruled (Pet. 25), "excluding from eligibility to citizenship resident aliens who have chosen not to render military service to the United States is not inconsistent with the treaty provisions." This Court said in *Moser* v. *United States,* 341 U. S. 41, 45, with respect to the Treaty of 1850 between Switzerland and the United States:

> That the statute unquestionably imposed a condition on exemption not found in the Treaty does not mean they are inconsistent. * * * we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purposes and subject matter of the Treaty. The Treaty makes no provision respecting citizenship.

In this respect, the Spanish treaty is like the Swiss treaty. It grants the nationals of one country the right to be free from military service in the other. It does not deal with the right of nationals of either country to become citizens of the other. Here, as in *Moser*, there is no inconsistency between Section 315 which deals solely with naturalization and Article V of the 1902 treaty which frees nationals from "compulsory military service."[3]

Petitioner argues that Article V of the Spanish treaty, by exempting Spanish nationals from compulsory military service "as well as from all obligatory official functions whatsoever", in effect placed them outside the coverage of the draft law and made it unnecessary for them to claim draft exemption. Section 315 (a), however, provides, as a condition precedent to the creation of the disability, merely that the exemption should be claimed and received. It does not even specify the manner in which the claim should be made. The claim of exemption is clearly not an "obligatory official function" from which petitioner was excused under the treaty.

---

[3] For a more complete background, history and analysis of the relationship between debarment from citizenship as a consequence of a claim to exemption from military service and treaties covering exemptions from military service, we respectfully refer the Court to our brief in *Moser* v. *United States*, October Term 1950, No. 301, pp. 38-79.

Although it is true that the 1902 treaty here involved, unlike the Swiss treaty, did not expressly exclude from its coverage political rights (see Pet. 11), that difference is not significant. As the government pointed out in its brief in *Moser* v. *United States,* October Term 1950, No. 301, p. 33, this exclusion is properly implied even if it is not express. Moreover, that distinction has no bearing on the issue here involved.

Accordingly, it is clear that Section 315, by imposing a bar to citizenship as a consequence of exemption from military service, did not contravene any rights granted to petitioner under Article V of the 1902 Spanish treaty. Since he knowingly claimed exemption, with full awareness of the consequences, he is debarred from citizenship under Section 315 (a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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